83-635

No. 83-1183

In The

SUPREME COURT OF THE UNITED STATES

January Term, 1984

- - - - - -

BOYD VEENKANT,

Petitioner

v

JANNETT L. COOK
Atty: DONALD WM. SARGENT
Atty: NOEL L. LIPPMAN
Atty: HOWARD S. SIEGRIST
Judge: SHEPMAN P. FAUNCE,

Respondents

- - - - - -

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorneys for **Respondent, Jannett L. Cook**

By: **BERNARD P. McCLOREY** (P-17312) and
JANET K. YARLING (P-32489)

QUESTIONS PRESENTED

The Respondent is not clear as to what questions the Petitioner raises but believes it to be:

> Were Petitioner's Civil Rights violated by denial of due process of law?

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STATEMENT OF FACTS

Respondent relies on the facts as set forth in the opinion of the U.S. District Court for the Western District issued February 7, 1983.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT SUBMITTED DUE TO THE LACK OF ANY IMPORTANT FEDERAL QUESTIONS AND DUE TO THE DISTRICT COURT'S RELIANCE UPON ADEQUATE, INDEPENDENT STATE GROUNDS AND FEDERAL RULES OF CIVIL PROCEDURE.

Rule 17 of the Supreme Court Rules sets forth in general the type of cases proper

for review by the Supreme Court. This case in no way meets the criteria for a review by this Honorable Court.

LYDIA DEWOLF specially appeared in this action in the U.S. District Court and brought a Motion to Dismiss and to Quash Service. She claimed:

1). service was ineffective under FRCP 4(d)(1) and FRCP 17(b);

2). the Statute of Limitations of Michigan bars any action against JANNETT COOK, her estate or her personal representative;

3). venue was improper; and

4). Plaintiff failed to state a claim as to JANNETT COOK, or her successors.

The DISTRICT COURT, by it opinion and order of February 7, 1983 found that:

1). Defendant COOK has not effectively been made a party to this action;

2). the Statute of Limitations barred Plaintiff's claim against Defendant COOK and dismissed Plaintiff's claims against her

> with prejudice. In a footnote, the Court noted that "it does appear that venue does not lie in the Western District of Michigan, and that Plaintiff has not adequately alleged a claim of fraud against this Defendant."

Upon appeal to the U.S. Court of Appeals, Sixth Circuit, Appellee COOK requested that the appeal be handled as a frivolous appeal and requested that it be dismissed. The appeal was dismissed as frivolous and the appellees were awarded double costs, amounting to One Hundred Twenty-six ($126.00) Dollars, and just attorney fees in the amount of Three Thousand ($3,000.00) Dollars, which remains unpaid.

This Petition for Writ of Certiorari is one more effort on the Petitioner's part to continue his abuse of process against the Respondents and to cause this Honorable Court and the Respondents to waste a lot of valuable time and money in considering it. The District

Court did not err in rendering its decision and the Court of Appeals recognized this in its order.

Therefore, Respondent COOK submits that this Court is without proper jurisdiction to review the opinion rendered by the U.S. District Court for the Western District of Michigan, and affirmed by the U.S. Court of Appeals, Sixth Circuit. Thus, the Petition for Certiorari should be denied.

CONCLUSION

The judgment sought to be reviewed in this matter rests upon questions of state law and federal procedure, wherein the action was dismissed based on the pleadings filed. There was no abuse of discretion by the lower courts in the rendering of their decisions nor was this a denial of due process to the Petitioner.

WHEREFORE, Respondent COOK prays this

Honorable Court deny this Petition for Writ of Certiorari.

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

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Dated: November 8, 1983

APPENDIX

INDEX

BOYD VEENKANT,

Plaintiff,

File No. K 81-309

v

JANNETTE L. COOK (Kuczyniski); ATTORNEY DONALD WILLIAM SARGENT; ATTORNEY NOEL L. LIPPMAN; ATTORNEY HOWARD S. SIEGRIST; SHERMAN FAUNCE, 37th DISTRICT COURT JUDGE,

Defendants.

OPINION

This case was filed by Plaintiff in propria persona on August 14, 1981, and is presently before the Court on Motions to Dismiss by each of the Defendants. The Complaint relates a string of events beginning with an alleged agreement between Plaintiff and Stanley Cook (a/k/a Stanley Kuczynski). According to Plaintiff, he had agreed to allow Mr. Cook to sell some guns and related merchandise for Plaintiff, and had given these goods to Mr. Cook for sale purposes, sometime prior to Mr. Cook's death in 1967. Plaintiff alleges that although he signed "dealer cost

sheets" and marked them as "paid," this was done only to avoid problems Mr. Cook might have if the guns were discovered in his possession, and was not intended as receipts of sale. Plaintiff alleges that he later asked Cook to return the merchandise, but that Cook was killed before he returned the property to Plaintiff. This action arises out of Plaintiff's unsuccessful efforts to recover the property or the value thereof, which he claims is rightfully his.

Defendant Jannette Cook was the widow of Stanley Cook; she is now deceased. The other Defendants are lawyers and a judge who were involved in a state court action brought by Plaintiff against Jannette Cook. Defendant Sargent was also involved in the probate of the Stanely Cook estate.

It appears from Plaintiff's Complaint and exhibits attached thereto that on June 9, 1967 Jannette Cook filed a petition for the probate

of Stanley Cook's will in the Macomb County Probate Court, alleging that the personal estate of Stanley Cook was some $1,000. In July of that year Plaintiff filed a claim in the Probate Court for the value of his property. However, on the petition of Defendant Attorney Donald Sargent, stating that there were no assets in the estate, the probate petition was dismissed on September 16, 1968. Plaintiff alleges that these actions were taken despite indications which led Plaintiff to believe that Mr. Cook had assets at the time of his death, and despite the debt allegedly owing to Plaintiff by Mr. Cook at the time of his death.

Plaintiff alleges that in January 1969, and again on an unspecified later date, he went to the Cook residence to demand the return of his property. He alleges that both Defendant Cook and her sister admitted to having the property in the house but did not turn it over

to Plaintiff; Defendant Cook denied that the property belonged to the Plaintiff. Plaintiff alleges that he then sent "the law" to recover the property for him, but by that time it had been removed from the house.

Plaintiff then filed a Complaint against Jannette Cook in the District Court for Macomb County, apparently on or about February 12, 1969. Plaintiff alleges that in August of 1969 he paid Defendant Attorney Noel Lippman a $200 retainer to represent him in this state court action. According to Plaintiff, however, Lippman took no action on the case, and Plaintiff filed a Complaint with the Michigan State Bar Association. The State Bar Grievance Board then advised Plaintiff by letter in February 1975 that Lippman had been suspended from the practice of law for five years as of December, 1974. Plaintiff alleges that despite this, Lippman wrote to him on March 12, 1975, asking Plaintiff to come in to discuss his

case. The Complaint does not disclose what happened at that time, except that it appears that an Amended Complaint was filed in the Macomb County District Court on March 24, 1975, signed by Defendant Attorney Howard S. Siegrist on behalf of Plaintiff. Plaintiff alleges that he never engaged Siegrist to represent him, and that he had no knowledge of the amendment of his Complaint until he received a copy of the Amended Answer at the end of October 1975. At that time, Plaintiff wrote to the Macomb County District Court inquiring about the status of his action and advising the Court that neither the Amended Complaint nor Siegrist's appearance was authorized by Plaintiff. Plaintiff alleges that the Amended Complaint was fraudulent.

Plaintiff alleges that he was notified sometime later that his case would be dismissed if no action was taken on it. Plaintiff states that he then hired Attorney John Watts, who moved for the retention of the case on the

grounds that Plaintiff had been hampered in obtaining representation. In response, Defendant Attorney Sargent filed an answer which stated that the merchandise in question had been purchased by Mr. Cook between 1961 and 1963; that Plaintiff had filed a claim in probate; and that any claim should be heard in probate. On April 18, 1978, over nine years after the action was originally filed by Plaintiff, Defendant District Court Judge Sherman P. Faunce, II heard and denied Plaintiff's Motion for Retention. Over three years later, Plaintiff filed this federal action.

I. Jannette L. (Kuczynski) Cook

On November 24, 1981, Lydia Helen DeWolf, personal representative of the estate of Jannette Cook, specially appeared in this action claiming that service on Jannette Cook was ineffective; that the statute of limitations bars any action by Plaintiff

against this Defendant, her estate or personal representative; that venue in the Western District of Michigan is improper; and that for various reasons Plaintiff fails to state a claim as to this Defendant or her successors.

Plaintiff named Jannette Cook as the Defendant in this action filed August 14, 1981, although Cook had died on April 20, 1980. (Exhibit A, Special Apearance and Motion to Dismiss. . .). Plaintiff states that upon learning of Defendant Cook's death, he obtained information that Attorney Steven Schoenberg represented the estate, and Plaintiff sought to serve that attorney. Defendant confirms that the Summons and Complaint were delivered to the offices of Cummings, McClorey, Davis & Acho, P.C., on that date, but argues that such service was improper. The Court agrees that Defendant Cook has not effectively been made a party to this action.

A claim for a debt against the estate of

Jannette Cook might have been brought against her personal representative. See MCLA §701(1); 700.741. Or, if the action had been pending against Defendant Cook at the time of her death, the personal representative could have been served and admitted to defend the action. MCLA §700.742; FRCP 25(a). However, service of the Summons and Complaint on the attorney for the estate is ineffective here for two reasons: Jannette Cook could not be sued because she was dead (See FRCP 17(b); MCLA §600.2051(1)); and service on an agent of a party is not sufficient unless the agent is specifically authorized to accept service or is appointed by law for that purpose. (FRCP 4(d) (1)). Plaintiff's Motion for Substitution of Parties pursuant to FRCP 25(a) is of no assistance to him in this case, because:

> The rule presupposes that substitution is for someone who was a party to a pending action. Substitution is not possible if one who was named as the party in

> fact died before the commencement of the action. 7A Wright and Miller, Federal Practice and Procedure: Civil §1951, p 638.

Because this Defendant was never effectively made a party to this lawsuit, dismissal of Plaintiff's Complaint as to Defendant Jannette Cook is appropriate.

In addition to the failure of Plaintiff to make Defendant Cook, her personal representataive, or her estate a Defendant in this action, the statute of limitations barred Plantiff's claims against Defendant Cook at the time this lawsuit was filed, and clearly bar any action against Defendant Cook's personal representative or estate at the present time. It is difficult to discern the legal grounds for Plaintiff's claims against Defendant Cook, but reading the Complaint in the light most favorable to Plaintiff, it appears that Plaintiff has sought to allege claims of fraud; conversion; and deprivation of property without

due process of law, in violation of 42 USC §§1983, 1985(3), and 1986.[1] The statute of limitations in Michigan for the tort of fraud is either three or six years, depending upon whether or not there is injury to person or property. MCLA §600.5813; MCLA §5805(8); See Case v Goren, 43 Mich App 673 (1972). A conversion claim must be brought within three years. MCLA §5805(8); Janiszowski v Behrmann, 345 Mich 8 (1956). The statute of limitations in §1986 actions is defined by the statute itself, and is one year. And generally, claims under §§1983 and 1985(3) have been found to be governed by Michigan's three year statute of limitations. See Gordon v City of Warren, 579 F 2d 386 (CA 6 1979); Krum v Sheppard, 255 F Supp 994 (WD Mich 1966), aff'd 407 F 2d 490. Plaintiff's claims against Defendant Cook arise out of Defendant's alleged refusal to return Plaintiff's property and the alleged removal of the property from her house sometime around

1969, and Defendant Cook's statements in the petition for probate filed in 1968. Even a six year statute of limitations had long expired when Plaintiff filed this action in 1981. Clearly Plaintiff will be unable at this time to bring any claims against Defendant Cook's personal representative or estate on these grounds. Plaintiff argues that the instant action is merely a continuation of his state court lawsuit, which was not time barred when commenced in 1969. However, the present action was commenced originally in federal court in 1981. The fact that it is based on the same circumstances does not make it the same action for statute of limitations purposes.

Because Defendant Cook was never properly made a party Defendant to this action, and because it appears from the fact of Plaintiff's Complaint that claims against this Defendant or her successors are time barred by the applicable statutes of limitations, Plaintiff's

claims against Defendant Cook are dismissed with prejudice.[2]

II. Judge Sherman Faunce, II

Defendant Michigan District Judge Sherman P. Faunce, II filed a Motion to Dismiss Plaintiff's claims as to him, on October 13, 1981. Defendant Faunce argues that Plaintiff's Complaint must be dismissed because it is barred by the statute of limitations, and because Defendant is immune from liabililty.

It is clear from the fact of the Complaint that Plaintiff's allegations as to this Defendant involve conduct which occurred on or before April 18, 1978, when Defendant Faunce denied Plaintiff's Motion for Retention of his state court action and dismissed the cause for lack of progress. Because this was an action taken by Defendant in his judicial capacity, he is absolutely immune from liabililty for damages even if his ruling was in error. Stump v Sparkman, 435 US 349, 359 (1978). In

addition, it appears that any claims against this Defendant for violations of the civil rights statutes are barred by the statute of limitations, since this action was filed over three years after the judge's 1978 ruling. Plaintiff's Complaint as to Defendant Faunce is therefore dismissed with prejudice.

III. Noel L. Lippman

Defendant Lippman has also moved for dismissal of Plaintiff's Complaint on the grounds that the applicable statutory periods of limitation have expired so as to preclude any claims by Plaintiff against him.

It appears that Defendant Lippman first became involved in the dispute between Plaintiff and Defendant Cook when Plaintiff retained Lippman to represent him in state court, in August of 1969. The Complaint contains no allegations of any continued relationship between Plaintiff and this Defendant after March 1975. However, assuming

that Plaintiff's claims against Defendant arise out of the dismissal of his state court action in 1978, the Court will view that date as the time at which Plaintiff's cause of action against this Defendant accrued. Reading the Complaint in the light most favorable to Plaintiff, the Court will assume that Plaintiff intends to state claims of violations of his civil rights, and malpractice. The Michigan statute of limitations in actions for malpractice is two years. MCLA §600.5805(4). As has been noted above, the relevant statutes of limitations for civil rights actions allow a plaintiff no more than three years to file his action.

Since more than three years had expired as the time this action was commenced, Plaintiff's claims against this Defendant are time barred, and his complaint as to this Defendant is dismissed with prejudice.[3]

IV. Howard S. Siegrist

Defendant Siegrist filed his Motion to Dismiss on October 26, 1981, also on the grounds that Plaintiff's action as to him is barred by the applicable statutes of limitations. Defendant Siegrist is the attorney whose name appears as Plaintiff's representative on an amended complaint filed in Plaintiff's state court action on March 24, 1975. While Plaintiff has not clearly alleged how, if at all, he was injured by the filing of the amended complaint, the Court will assume for the purposes of this motion that Plaintiff has stated claims of civil rights violations and fraud against this Defendant. Because the Complaint in this action was filed more than six years after the filing of the amended complaint, Plaintiff is barred from bringing this action against Defendant Siegrist, and his Complaint as to this Defendant is dismissed with prejudice.

V. Donald William Sargent

Defendant Attorney Sargent represented Defendant Cook in Plaintiff's state court proceedings, and also requested that the probate petition for Stanley Cook be dismissed. He has moved for dismissal solely on the basis of improper venue, pursuant to 28 USC §1406(a). It does appear that venue for this action does not properly lie in the Western District of Michigan. All of Defendants appear to reside in the Eastern District of Michigan; the probate of Stanley Cook's estate took place in Eastern Michigan; Plaintiff's state court action was brought in the Eastern District of Michigan; and Defendant Cook resided in the Eastern District of Michigan when she allegedly converted Plaintiff's property. Because this is an action which is not, and could not be, based solely upon diversity jurisdiction, venue is proper only in the Eastern District of Michigan. 28 USC §1391(b).

28 USC §1406(a) provides that where a case is filed in the wrong district, the Court may dismiss the action, or "if it be in the interest of justice" the Court may transfer the case to the district in which the action should have been brought. In this case, while Defendant Sargent has not moved for dismissal for failure to state a claim, or because the statute of limitations bars the action, it appears that either of these defenses would result in dismissal with prejudice against Plaintiff. For that reason, it would not be in the interest of justice to transfer this action to the Eastern District of Michigan, and Plaintiff's action against Defendant Sargent is therefore dismissed. And because it appears from the fact of the Complaint that Plaintiff's civil rights claims against this Defendant are barred by the statute of limitations, and that Plaintiff fails to state a cause of action for fraud against this Defendant, the dismissal is

with prejudice.

VI. Conclusion

For reasons set forth above, Plaintiff's Complaint is dismissed with prejudice as to all Defendants.[4] Because dismissal is appropriate, it is not necessary to decide Plaintiff's Motions for Summary Judgment, filed October 19 and 23, 1981. A careful review of those motions does not reveal any basis for denying the motions to dismiss, nor does it appear that summary judgment could have been granted in Plaintiff's favor. Plaintiff also requests in a motion filed October 19, 1981, that this Court convene a grand jury to review the alleged misconduct of Defendant Lippman. Two grand juries are currently in session in this District, obviating the need for the Court to consider this motion. If Plaintiff wishes to get a Complaint before the grand jury, he must go through the United States Attorney's Office. That office will only refer cases to the grand

jury where there is a report from an investigative agency demonstrating evidence of criminal activity within this District. Plaintiff is therefore directed to the Federal Bureau of Investigation to seek investigation of any claims.

RICHARD A. ENSLEN
US District Judge

DATED: 2-4-83

[1]Plaintiff's allegations of criminal conduct, scattered throughout his Complaint, are of course outside the scope of this Court's jurisdiction in a civil action, and are not further considered. Plaintiff has also alleged violations of 42 USC §1988, but that section does not set forth an independent cause of action. See Moor v Alameda County, 411 US 693, 702 (1973).

[2]Because these issues are dispositive of Plaintiff's claims against Defendant Cook, the Court need not discuss Defendant's other proposed grounds for dismissal. However, the Court notes that it does appear that venue does not lie in the Western District of Michigan, and that Plaintiff has not adequately alleged a claim of fraud against this Defendant.

[3]Plaintiff has alleged in his answer to Defendant's motion, that Defendant's affidavit is made in bad faith and therefore Plaintiff is entitled to summary judgment. Grant of summary judgment is not the appropriate remedy when affidavits are submitted in bad faith. FRCP 56(g). Moreover, Plaintiff has not demonstrated how Defendant has in bad faith stated facts with specific regard to this motion. In fact, the basis of this motion is Plaintiff's own Complaint. Any bad faith which may have occurred during the course of the attorney-client relationship between Plaintiff and this Defendant, does not affect the merits of Defendant's arugments in the instant motion.

[4]While dismissal of this action is largely based upon statute of limitations grounds, it also appears that this action was commenced in an improper venue; the presence of this Court's jurisdictional minimum of damages, is likewise dubious. Moreover, while this Opinion assumes

for the purpose of the motions that Plaintiff states claims against the Defendants, it is not at all clear that that is the case.

BOYD VEENKANT,

Plaintiff,

File No. K 81-309

v

JANNETTE L. COOK (Kuczynski); ATTORNEY DONALD WILLIAM SARGENT; ATTORNEY NOEL L. LIPPMAN; ATTORNEY HOWARD S. SIEGRIST; SHERMAN FAUNCE, 37TH DISTRICT COURT JUDGE,

Defendants.

ORDER

In accordance with the Opinion in the above entitled action, issued February 4th, 1983,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss are granted, and the Complaint is hereby dismissed with prejudice.

RICHARD A. ENSLEN
US District Judge

Dated: 2-4-83

Appendix A

BOYD VEENKANT,

Plaintiff,

File No. K 81-309

v

JANNETTE L. COOK (Kuczynski); ATTORNEY DONALD WILLIAM SARGENT; ATTORNEY NOEL L. LIPPMAN; ATTORNEY HOWARD S. SIEGRIST; SHERMAN FAUNCE, 37TH DISTRICT COURT JUDGE,

Defendants.

ORDER

In light of this Court's Opinion and Order of February 4th, 1983, Plaintiff's Motion pursuant to Federal Rule of Civil Procedure 45(b) is hereby **DENIED.**

IT IS SO ORDERED.

RICHARD A. ENSLEN
US. District Judge

DATED: 2-4-83

BOYD VEENKANT,

Plaintiff,

File No. K 81-309

v

JANNETTE L. COOK (Kuczynski);
ATTORNEY DONALD WILLIAM SARGENT;
ATTORNEY NOEL L. LIPPMAN; ATTORNEY
HOWARD S. SIEGRIST; SHERMAN FAUNCE,
37TH DISTRICT COURT JUDGE,

Defendants.

ORDER

Plaintiff having moved, pursuant to Federal Rule of Civil Procedure 60(b)(2) and (3), for reconsideration of the Court's Opinion and Order in the above captioned cause, dated February 4, 1983; the Court having carefully reviewed Plaintiff's Motion, and the file herein; the Court adheres to its Order of February 4, 1983 for the reaons stated in its Opinion of that date, and Plaintiff's Motion is

therefore denied.

IT IS SO ORDERED.

RICHARD A. ENSLEN
US District Judge

DATED in Kalamazoo, MI: 2-18-83

BOYD VEENKANT,

Plaintiff-Appellant,

v

JANNETTE L. COOK (Kuczynski);
ATTORNEY DONALD WILLIAM SARGENT;
ATTORNEY NOEL L. LIPPMAN; ATTORNEY
HOWARD S. SIEGRIST; SHERMAN FAUNCE,
37TH DISTRICT COURT JUDGE,

Defendants-Appellees.

BEFORE: LIVELY and MERRITT, Circuit Judges; and PECK, Senior Circuit Judge.

ORDER

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record and briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff appeals the district court order entered February 7, 1983, dismissing his civil rights action. Having carefully examined the record and briefs, this Court concludes the

district court did not err in disposition of this case. Accordingly, for the reasons stated in the district court opinion entered February 7, 1983 the order of the district court is hereby affirmed. Rule 9(d)(2), Rules of the Sixth Circuit.

Based upon the record in this case and the briefs filed, we are convinced that this appeal is frivolous. This appeal amounts to little more than a continued abuse of process which raises no colorable legal or factual basis for the relief sought. It is totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utter nonsense. In fact this Court notes unfavorably the pattern of frivolous litigation perpetuated by plaintiff. See Veenkant v Gurn, Case No. 82-1582 (6th Cir. 1983); Veenkant v Wesler, Case No. 82-1584 (6th Cir. 1983); Veenkant v Burdick, Case No. 82-1583 (6th Cir. 1983); Veenkant v Corsiglia, Case No. 82-1824 (6th

Cir. 1983) (unpublished opinions).

Pursuant to Federal Rule of Appellate Procedure 38, we award double costs and just attorneys fees to appellees.

ENTERED BY ORDER OF THE COURT

_____
Clerk

REISSUED AS MANDATE: OCTOBER 28, 1983

COSTS: Printingof brief $126.00 x 2	=	$ 252.00
Attorney Fees	=	$3,000.00
TOTAL		$3,252.00